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No. 86-849

In the Supreme Court of the United States

OCTOBER TERM, 1986

ANDREW J. WOODRICK, PETITIONER

v.

PETER B. HUNGERFORD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner must exhaust his available intraservice remedies before seeking judicial review of his claim that his enlistment contracts with the military are void by reason of a material misrepresentation as to his fitness to be a fighter pilot.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 800 F.2d 1413. The opinions and orders of the district court (Pet. App. 14a-18a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19a-20a) was entered on October 1, 1986, and a petition for rehearing was denied on October 30, 1986 (Pet. App. 21a). The petition for a writ of certiorari was filed on November 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In September 1981 petitioner joined the Air Force Reserve Officers Training Program (AFROTC) at Memphis State University. He executed a standard AFROTC contract which required him to participate as a cadet in AFROTC and to accept a commission in the Air Force Reserve upon graduation. Pet. App. 3a. Petitioner enlisted for a minimum of six years and signed a "statement of understanding" which provided that, under certain circumstances, he could be ordered to active duty in his enlisted grade for a period of two years. Specifically, the agreement provided that petitioner could be called to active duty if he was "discontinued from the AFROTC professional officer course" because of "(1) Indifference to training, (2) Disciplinary reasons, (3) Breach or anticipatory breach of the terms of the contractual agreement, [or] (4) Declining to accept a commission" (*id.* at 3a-4a). Petitioner participated in the AFROTC program without incident throughout the 1981-1982 school year (*id.* at 4a).

Before joining AFROTC, petitioner had been given a Department of Defense physical examination to determine whether he was physically qualified for the pilot-candidate program. The examination found that petitioner was qualified and specifically found that he had passed the color vision test. Pet. App. 3a. His AFROTC contract duly noted that petitioner was "qualified to be a pilot candidate" (*ibid.*). In October of 1982, however, petitioner failed the color vision test in a second, precommissioning physical. Since color blindness would disqualify him from flying, petitioner was asked to take the test a third time to verify the results. *Id.* at 4a. He declined

to do so and unilaterally stopped attending AFROTC classes (*ibid.*).

An investigation was ordered into petitioner's failure to attend classes. Petitioner was warned that he could be expelled from AFROTC for cause and called to active duty as an enlisted man. He was given an opportunity to cross-examine witnesses and present evidence on his own behalf. At the conclusion of the investigation, petitioner was expelled from AFROTC for breach of his contract and ordered to active duty in enlisted status, effective May 31, 1984. Pet. App. 4a. Petitioner did not appear for duty and was declared absent without leave (AWOL). After failing to appear for duty within 30 days, petitioner was classified as a deserter. *Id.* at 5a.

On March 21, 1985, petitioner was arrested and transported to Lackland Air Force Base in San Antonio, Texas, to face charges of desertion under Article 85 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 885. Petitioner's commanding officer, respondent Hungerford, ordered an investigation into the desertion charges and requested findings as to whether a court-martial should be convened. Pet. App. 5a; see 10 U.S.C. 832.[1]

2. On April 10, 1985, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Texas. He requested that his enlistment contracts with the Air

[1] At this time, petitioner was examined by two Air Force ophthalmologists, both of whom concluded that petitioner was indeed color blind, that this condition was probably congenital (and therefore in existence at the time of the initial examination), and that it was too severe to be waived for pilot qualification.

Force be rescinded on the ground of fraudulent inducement or mutual mistake, and that the Air Force be ordered to grant him an honorable discharge. Pet. App. 5a. The government moved to dismiss on the ground that petitioner had failed to exhaust his available remedies within the military (*id.* at 5a-6a).[2]

The district court denied the government's motion to dismiss, concluding that petitioner was entitled to a determination of the validity of his contracts prior to any court-martial proceedings. The district court stated that "it must intervene in this case because the court-martial itself is not convened to determine the validity of the petitioner's enlistment contract, but to determine the criminal issues that stem from the breach of what petitioner claims is an unenforceable contract" (Pet. App. 15a). The court also concluded that petitioner would "risk irreparable harm should the court-martial be permitted to determine the criminal desertion issue before first settling the contract issues" (*ibid.*).

On the merits of the contract claim, the district court found that the Air Force's pre-enlistment statement that petitioner was qualified for the pilot-candidate program was a material misrepresentation of fact upon which petitioner had relied in executing his enlistment agreements and that those contracts were, therefore, subject to rescission. Pet. App. 18a. Since the initial contracts were void, the court reasoned, petitioner had not enlisted and the Air Force

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[2] Petitioner subsequently sought a temporary restraining order to enjoin respondents from proceeding with the pre-court-martial investigation under UCMJ Art. 32, 10 U.S.C. 832. That motion, however, became moot when the government agreed to stay the investigation pending disposition of the habeas petition. Pet. App. 6a-7a.

was without jurisdiction over him (*id.* at 6a). The district court therefore granted the writ and ordered the Air Force to separate petitioner immediately and to relieve him of any obligation under his military contracts (*id.* at 18a).

3. The court of appeals unanimously reversed and vacated the writ of habeas corpus. Pet. App. 1a-13a. The court first noted (*id.* at 7a) that petitioner "sought only rescission of the AFROTC and enlistment contracts and his separation [from the Air Force], not intervention in the court-martial" (which, in any event, the government had agreed to stay pending disposition of the habeas action). Thus, while noting that "exhaustion of administrative remedies is required before a civilian federal court can intervene in the proceedings of a court-martial" (*ibid.*, citing *Schlesinger* v. *Councilman*, 420 U.S. 738, 758 (1975)), the court of appeals concluded that the pendency of the pre-court-martial investigation was "immaterial" to the central question before it. That question was whether "exhaustion of administrative remedies must precede invocation of [habeas corpus] to rescind an enlistment contract" (Pet. App. 7a-8a).

The court held that exhaustion of administrative remedies in such circumstances is required. "In addition to the usual reasons for requiring use of established procedures before countenancing resort to litigation," the court of appeals found particularly weighty "the need for limiting civil court intervention in internal military affairs * * *." Pet. App. 9a. The court therefore held that "where a serviceman seeks to effect a rescission of his enlistment contract by means of a habeas writ in federal court, he must show that he has exhausted all available intraservice remedies." *Ibid.* (citing *Mindes* v. *Sea-*

man, 453 F.2d 197, 201 (5th Cir. 1971)). The court recognized that exceptions to the exhaustion doctrine would exist where "pursuit of intraservice remedies would be futile or would cause [the serviceman] to suffer irreparable harm" (Pet. App. 9a). But the court canvassed the remedies available to petitioner within the military and concluded that they were not "futile" and that petitioner had not "shown that he would have suffered irreparable injury" in pursuing them. Specifically, the court concluded that petitioner had three available options: (1) a request for discharge in lieu of court-martial, pursuant to Air Force regulations; (2) a petition to the Air Force Board for the Correction of Military Records (AFBCMR), pursuant to 10 U.S.C. 1552; and (3) a Complaint of Wrongs filed against his commanding officer, pursuant to UCMJ Art. 138, 10 U.S.C. 938.

4. The mandate of the court of appeals issued on November 10, 1986, and the district court dismissed the writ a week later. Petitioner's motion for a recall of the mandate and a stay of the pre-court-martial investigation was denied by the court of appeals on November 26, 1986. Petitioner's application to this Court for a stay was denied by Justice White on January 29, 1987.

The Article 32 investigation into petitioner's case was completed on January 12, 1987, and the case was referred to a general court-martial scheduled for February 24, 1987.[3] Petitioner in the meantime

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[3] The information set forth in this paragraph is not contained in the record that was before the court of appeals. It is derived from petitioner's stay papers in this Court, from the record of the Court of Military Appeals proceeding (see page 7, *infra*), and from information supplied to us by the Air Force.

availed himself of several avenues of potential relief within the military. First, he filed a petition for a discharge with the AFBCMR, which is currently pending. Second, he filed a Complaint of Wrongs against his commanding officer under UCMJ Art. 138, 10 U.S.C. 938. On April 6, 1987, the Office of the Judge Advocate General, acting on behalf of the Secretary of the Air Force, determined that the wrongs complained of by petitioner were cognizable under Article 138 and ordered that petitioner's complaint be investigated and acted upon within 45 days. Third, on January 13, 1987, petitioner filed a habeas corpus petition in the Court of Military Appeals, contending that the court-martial scheduled to consider his case lacked personal jurisdiction over him. Petitioner sought "an order directing the Respondents to release the petitioner civilian from military control, to cease court-martial action against him, and to expunge all federal records alleging petitioner deserted from the armed forces." Petition for Extraordinary Relief 1 (Jan. 13, 1987). On February 18, 1987, the Court of Military Appeals granted a stay of the court-martial and issued an order to respondents to show cause why the requested relief should not be granted. The issues have been briefed by the parties—the Air Force argued that the issues are not yet ripe for resolution but should be decided as an initial matter within the context of the court-martial—and oral argument is scheduled for April 15, 1987. Meanwhile, the stay of the court-martial is still in effect.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Petitioner's contentions are now pending before the appropriate military authorities, and review by this Court plainly is not warranted at this time.

1. The decision of the court of appeals fully accords with the general rule that federal courts will not entertain habeas petitions from members of the military until all available intraservice remedies have been exhausted. *Noyd* v. *Bond*, 395 U.S. 683, 693 (1969); *Gusik* v. *Schilder*, 340 U.S. 128 (1950); *Williams* v. *Secretary of the Navy*, 787 F.2d 552, 558-559 n.8 (Fed. Cir. 1986) (collecting authorities); *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1971).[4] Petitioner attempts (Pet. 12-14) to evade this settled rule by arguing that without immediate federal court intervention the military will subject to court-martial a civilian over whom it has no jurisdiction. Petitioner cites (Pet. 14) a series of this Court's cases intervening in and precluding such courts-martial. *McElroy* v. *United States ex rel. Guagliardo*, 361 U.S. 281 (1960) (civilian employee); *Reid* v. *Covert*, 354 U.S. 1 (1957) (spouse of serviceman); *United States ex rel. Toth* v. *Quarles*,

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[4] This rule is just one application of the broader principle favoring the exhaustion of administrative remedies generally. See, *e.g.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). The principle applies, however, with special force in the military context, a context in which "[n]ot only is the scope of Congress' constitutional power * * * broad, but the lack of competence on the part of the courts is marked" (*Rostker* v. *Goldberg*, 453 U.S. 57, 64-65 (1981)). See *Schlesinger* v. *Councilman*, 420 U.S. 738, 756-758 (1975); Pet. App. 9a.

350 U.S. 11 (1955) (discharged serviceman). See also *Schlesinger* v. *Councilman*, 420 U.S. at 758-759.

Petitioner's argument is flawed in two principal respects. First, as the court of appeals noted (Pet. App. 7a), petitioner's Complaint did not ask the district court to enjoin his court-martial; indeed, no court-martial had even been convened at the time petitioner brought this lawsuit. Rather, petitioner asked the district court to rescind his enlistment contracts. Thus, the principal question here is whether the validity of a serviceman's enlistment contracts should be decided, as an initial matter, by the military. Permitting petitioner to bring his dispute directly to federal court—and thereby make the federal courts an alternative forum, rather than a forum of last resort for such complaints—would undermine the system of remedies established by Congress within the armed forces. As this Court has noted (*Noyd* v. *Bond*, 395 U.S. at 696): "If the military courts do vindicate petitioner's claim, there will be no need for civilian judicial intervention. Needless friction will result if civilian courts throughout the land are obliged to review comparable decisions of military commanders in the first instance." See also *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94 (1953).

Second, even if petitioner's court-martial, which has been stayed by the Court of Military Appeals, were at issue in this case, the premise of his argument—that he is a civilian—prejudges the merits of his claim. In the cases cited by petitioner it was undisputed that the individual being court-martialed was not currently in military service. Petitioner, by contrast, took the oath of enlistment in the Air Force Reserve and did so with "the capacity to understand the significance of enlisting in the armed forces."

10 U.S.C. (& Supp. III) 802(b). See also *In re Grimley*, 137 U.S. 147, 156-157 (1890). And petitioner has not claimed that he has been officially discharged from the military. Thus, the question whether petitioner is currently in military service is a disputed one that hinges on the proper construction of his enlistment contracts, and it is a question that the military, under settled principles, should be permitted to decide in the first instance.

Petitioner's contention (Pet. 14) that a court-martial could not consider the validity of his enlistment contract is mistaken. Lack of personal jurisdiction over the defendant is, in fact, a complete defense to the charge of desertion since membership in the armed forces is an element of that offense. 10 U.S.C. 885. The government must prove personal jurisdiction over petitioner in any future court-martial proceeding beyond a reasonable doubt. *United States* v. *Marsh*, 15 M.J. 252, 254 (C.M.A. 1983); *United States* v. *Bailey*, 6 M.J. 965, 969 (N.C.M.R. 1979). Thus, this Court's admonition in *Schlesinger* v. *Councilman*, 420 U.S. at 758, is fully applicable to the instant case:

> [W]hen a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention by way of injunction or otherwise.

In short, because the federal courts would be perfectly capable of considering petitioner's contentions about the alleged invalidity of his enlistment contracts if and when those contentions have been rejected by a court-martial (*Burns* v. *Wilson*, 346 U.S.

137 (1953)), review by the federal courts would be both premature and improper at this time.[5]

2. The court of appeals correctly pointed out (Pet. App. 9a) that exhaustion of intraservice remedies is not required where pursuit of such remedies would be futile or cause irreparable harm. Petitioner's assertion (Pet. 17-19) that the three intraservice remedies discussed by the court of appeals are so "defective" as to be futile is quite unconvinc-

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[5] Petitioner makes two other arguments on the general question of exhaustion, neither of which is persuasive. Contrary to petitioner's contention (Pet. 16), the fact that the district court did not require exhaustion does not preclude the court of appeals from reaching a contrary result. While the doctrine of exhaustion of remedies does not necessarily deprive a district court of the *power* to act (see *Schlesinger* v. *Councilman*, 420 U.S. at 753-758), the district court's determination to overlook the exhaustion requirement in petitioner's case is not insulated from review by the court of appeals. *McLucas* v. *DeChamplain*, 421 U.S. 21, 26-27, 32-34 (1975); *Schlesinger* v. *Councilman*, 420 U.S. at 753-758; *Parisi* v. *Davidson*, 405 U.S. 34, 37 (1972).

Second, again contrary to petitioner's contention (Pet. 16), there is no general exception to the exhaustion requirement where criminal proceedings are imminent. Petitioner's reliance on *McKart* v. *United States*, 395 U.S. 185 (1969), for that proposition is completely misplaced. The question in *McKart* was whether the defendant in a criminal proceeding in federal court was precluded from raising a defense that he had failed to pursue administratively. The Court specifically noted (395 U.S. at 196-197): "We are not here faced with a premature resort to the courts—all administrative remedies are now closed to petitioner." In the instant case, by contrast, petitioner's resort to the courts is premature. He not only has several administrative remedies available to him short of defending a court-martial, but even if he should be court-martialed, he could raise in that forum his defense that his enlistment contract was void *ab initio*.

ing, particularly in light of the subsequent history of this case. Petitioner in fact has availed himself, at last, of two of those avenues of relief. He has petitioned the AFBCMR for a discharge,[6] and he has filed an Article 138 Complaint of Wrongs against his commanding officer.[7] Both of these actions are still pending within the military.

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[6] Despite some historical uncertainty over the authority of the Board to grant a discharge (see *Pence* v. *Brown*, 627 F.2d 872, 875 n.5 (8th Cir. 1980)), the Secretary of the Board filed an affidavit in this case indicating that the Secretary of the Air Force, acting upon the recommendation of the Board, is so empowered. Pet. App. 11a. The Board's statutory grant of jurisdiction to "correct any military record * * * when * * * necessary to correct an error or remove an injustice," 10 U.S.C. 1552, would certainly seem to embrace that power. In any event, the question has now been presented to the Board for initial resolution, as it should have been at the outset.

Petitioner's contention (Pet. 17) that the Board's procedures are too slow to forestall his court-martial was properly rejected by the court of appeals, which noted that petitioner could have petitioned the Board several years ago "once he learned that he was not medically qualified to fly." Pet. App. 11a. See also *Seepe* v. *Department of the Navy*, 518 F.2d 760, 765 (6th Cir. 1975); *Adkins* v. *United States Navy*, 507 F. Supp, 891, 899 (S.D. Tex. 1981). In any event, petitioner's court-martial has now been stayed indefinitely.

[7] The three grounds advanced by petitioner (Pet. 18) for not filing such a Complaint before resorting to federal court are unconvincing. Petitioner's Complaint was properly directed at his commanding officer for that officer's alleged failure "to investigate his contractual claims and initiate separation action." Pet. App. 12a. Such claims are not related to military discipline, and petitioner's contention that he cannot use Article 138, on the theory that he is not a member of the armed forces, again prejudges the merits of his Complaint. Presumably he would have no objection if the Air

The third potential means of relief discussed by the court of appeals—a discharge in lieu of trial by court-martial—is also available to petitioner. As the court of appeals correctly noted (Pet. App. 11a), "it is possible that [petitioner] could have obtained an honorable discharge through this avenue." See Air Force Reg. 39-10, paras. 1-16, 1-19 and 4-2 (Oct. 1, 1984). Petitioner presents no support for his contention to the contrary (Pet. 18). Furthermore, even if petitioner were to receive in lieu of trial by court-martial a discharge that was other than honorable, he would be free to petition the AFBCMR to have the status of his discharge changed. As we have noted, the AFBCMR is authorized to "correct any military record * * * when * * * necessary to correct an error or remove an injustice." 10 U.S.C. 1552.

Petitioner has also pursued a fourth avenue not discussed by the court of appeals. He has sought extraordinary relief from the Court of Military Appeals, which has stayed his court-martial pending resolution of his claim of wrongful induction. A decision in his favor by that court would completely forestall the court-martial and provide petitioner with all the relief he has requested.

Petitioner has failed to show not only that the avenues of relief afforded him within the military are futile, but also that he would suffer irreparable harm by having to resort to them. First, petitioner may well avoid court-martial and obtain a discharge from

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Force, upon completion of the Article 138 process, agreed with him. In any event, the Office of the Judge Advocate General has now determined that petitioner's claims are cognizable in an Article 138 Complaint and has ordered a prompt resolution of those claims.

the Air Force by one of the means that he is currently pursuing or could pursue. Second, even if petitioner is ultimately court-martialed, this Court has already indicated that " 'the cost, anxiety, and inconvenience' " of having to defend against a court-martial cannot " 'by themselves be considered "irreparable" in the special legal sense of that term.' " *Schlesinger* v. *Councilman*, 420 U.S. at 755 (quoting *Younger* v. *Harris*, 401 U.S. 37, 46 (1971)).

In short, the exhaustion rule applied by the court of appeals is fully in accord with settled authorities. Its conclusions that intramilitary remedies were available to petitioner and that petitioner had failed to show irreparable harm were both correct. The decision below thus warrants no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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